Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

NO. _____

* * * 79-1764

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner

V.

JOYCE ANN BURDINE,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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* * *

Petitioner, Texas Department of Community Affairs, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on December 17, 1979, with rehearing denied on March 10, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported in 608 F.2d 563. The opinion along with the Order overruling Petitioner's Petition for Rehearing and the Judgment of the District Court are attached as Appendices hereto. Also attached is the decision of the District Court which was appealed by the Respondent to the Court of Appeals.

JURISDICTION

The opinion of the Court of Appeals was entered on December 17, 1979. A timely petition for rehearing with a suggestion that the rehearing be en banc was denied on March 10, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that the Defendant in a Title VII case must prove by a preponderance of the evidence that it relied on a non-discriminatory reason in making a challenged employment decision or whether a Defendant is merely required to articulate a non-discriminatory reason for the decision which the Plaintiff must prove to be pretextual.

2. Whether a finding of non-discriminatory motive by the District Court should be upheld unless found to be clearly erroneous.

STATUTE INVOLVED

The statute involved is 42 U.S.C. §2000e, et. seq.

STATEMENT OF THE CASE

Respondent was hired by Petitioner in January, 1972 as an accounting clerk in the Public Service Careers Division (PSC). She was promoted in July, 1972 to Field Services Coordinator. In early October 1972 Mark Nealy, the Project Director of PSC, assigned Respondent additional duties. Nealy resigned in mid-October 1972, and additional duties were assigned to Respondent in November 1972 by Nealy's former supervisor, John Malone. After Nealy resigned, Respondent performed a coordinating role for the PSC project under Malone (p. 90 TR.). She had some supervisory responsibility (p. 91 TR.).

The United States Department of Labor (DOL) totally funded PSC; in February 1973 DOL gave written notice to B.R. Fuller, the Executive Director of Petitioner, that the PSC program would be terminated at the end of March 1973 because of certain inadequacies. Mr. Fuller subsequently convinced DOL to continue funding PSC subject to certain conditions. DOL ordered the appointment of a permanent Project Director and a reorganization and reduction of staff.

Fuller believed that Respondent was at least partially responsible for the inadequacies in PSC found by DOL and for some dissension among the PSC staff. He decided that the project could best be served if she were terminated along with Marian Kirkland and Roberto Carraveo, the two other professional level employees involved in the dissension.

Fuller appointed Robert Watts to fill the position of Project Director and promoted Robert Walz to the position of Project Coordinator. Walz was the only professional level employee retained in the PSC program.

Respondent, Plaintiff in the District Court below, filed suit in the United States District Court against Petitioner, alleging that she had been discriminated against on the basis of sex in violation of 42 U.S.C. §2000e et seq. After a trial to the Court, the District Court ruled on December 8, 1976, that Petitioner had not acted with discriminatory intent in terminating Burdine while hiring Watts and retaining and promoting Walz.

The Court of Appeals for the Fifth Circuit in its opinion of December 17, 1979, affirmed the District Court's ruling that there had been no discrimination in the decision to hire Watts, rather than Petitioner, for the position of Project Director. However, the Court of Appeals reversed the District Court's finding of no discrimination insofar as it applied to the termination of

Respondent and retention and promotion of Walz. The Court of Appeals ruled that Petitioner had failed to prove by a preponderance of the evidence that it had relied on non-discriminatory reasons in making the decision to retain and promote Walz while terminating Respondent.

Petitioner then filed a petition for rehearing (with the suggestion that the rehearing be en banc) in the Court of Appeals; the petition was overruled on March 10, 1980.

Petitioner now files this Petition for Writ of Cetiorari.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals found that Petitioner discriminated on the basis of sex when it discharged Respondent and retained and promoted Walz. After finding that Respondent had established a prima facie case of intentional discrimination, the Court held that Petitioner had failed to prove by a preponderance of the evidence that the challenged personnel decision had been based on legitimate, non-discriminatory reasons. However, Petitioner at the very least articulated non-discriminatory reasons for the personnel actions taken and Respondent was unable to prove that the reasons articulated were merely pretextual as required under the rule of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Respondent was acting in at least a limited supervisory capacity for the PSC program at the time that the problems with DOL arose. Mr. Fuller testified that part of the PSC program's problems with DOL could be attributed to Respondent in her coordinating and supervising role. (pp. 90, 91 TR.) These problems included (p. 77 TR.):

(1) Lack of proper documentation of expenditures;

(2) Payments made on expired contracts;

(3) Inaccurate expenditure accruals;

(4) Inaccurate enrollee certifications;

(5) Unqualified enrollees being allowed into programs.

Furthermore, in her supervisory role Respondent was, in Mr. Fuller's estimation, ultimately responsible for resolving communication and dissension problems among the staff (pp. 91, 95 TR.). This she failed to do, for, as the District Court found (p. 3, Memorandum Opinion and Order), Respondent and the two other individuals who were terminated from the program with Respondent had disagreements and did not work well together.

Petitioner concluded that a fresh start was needed in the PSC program. Watts, a man with excellent credentials, was made the new Project Director. The contentious employees in the program including Respondent, were removed and Walz, a well qualified young man who was apparently uninvolved in the office dissension was promoted to the position of Project Coordinator. Petitioner reacted to a serious problem with a thorough house cleaning and reorganization of the PSC program.

Petitioner articulated legitimate, non-discriminatory reasons for retaining and promoting Walz while terminating Respondent and thereby satisfied the standard set out in *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978), and *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), for rebutting Respondent's prima facie case. The PSC program had been so poorly managed while Respondent was in a position of at least partial responsibility that it had been threatened with cancellation by DOL. At the same time, as the District Court found, dissension between Respondent and two co-workers in the program lessened their ability to work together. Petitioner concluded that the best solution was

to clear out the troublemakers and proven incompetents and start over.

Only one professional level employee, Walz, was retained in the PSC program. He was promoted to a supervisory position below the new Project Director. Respondent introduced no evidence at trial to rebut Mr. Fuller's testimony that Walz was qualified for this position. Neither was she able to rebut the testimony articulating the reasons for her termination. She introduced no evidence that Walz had been a participant in the dissension wracking the program. There was no evidence attributing to Walz any responsibility for the problems with the program pointed out by DOL. In short, Petitioner articulated several legitimate, non-discriminatory reasons for terminating Respondent and retaining and promoting Walz. At that point, the burden of proof shifted back to Respondent to show that the reasons articulated were pretextual. Respondent failed to satisfy this burden.

The Court of Appeals erred when it held that Petitioner was required to prove by a preponderance of the evidence that it had based its personnel decisions on the reasons that it articulated. Such a rule is in essence the same as requiring Petitioner to prove the absence of discriminatory motive and therefore, conflicts with this Court's holding in *Board of Trustees v. Sweeney, supra.* Realistically, the only way a defendant could prove absence of discriminatory motive would be to prove reliance on legitimate, job related considerations as the Court of Appeals has required in this case. This Court in *Sweeney* held that such proof is not required of a defendant in a Title VII case.

II.

After hearing all of the evidence, the District Court concluded that the personnel actions taken by Petitioner were not based in whole or in part, on considerations of sex. That finding, involving mixed questions of fact and

law, should have been upheld by the Court of Appeals unless found to be clearly erroneous. *Sweeney v. Board of Trustees*, 604 F.2d 106 (1st Cir. 1979), cert. denied, _____ U.S. _____, 100 S.Ct. 733 (1980).

The District Court specifically found that Respondent could not get along with Kirkland and Carraveo and that, consequently, the PSC program was suffering. That fact finding, underlying the ultimate finding of no discrimination, is unquestionably reviewable only under a clearly erroneous standard, *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), and, together with other testimony in the record, justified the District Court's ultimate conclusion that Respondent was not discriminated against.

There is conflict among the circuits as to whether an ultimate finding regarding discriminatory intent should be reviewed under a clearly erroneous standard. *Stewart v. General Motors Corporation*, 542 F.2d 445 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977); *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975). This would be a proper case in which to settle the question.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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First Assistant Attorney General

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon attorney for Respondent by placing same in the United States mail, certified, return receipt requested, addressed to Mr. Hubert L. Gill, P.O. Box 777, Austin, Texas 78767 on this the _____ day of April, 1980.

_____
LONNY F. ZWIENER

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOYCE ANN BURDINE	§	
	§	
v.	§	CIVIL ACTION NO.
	§	A-74-CA-238
	§	
TEXAS DEPARTMENT	§	
OF COMMUNITY	§	
AFFAIRS	§	

MEMORANDUM OPINION AND ORDER

This is a Title VII discrimination in employment case which was tried before the Court in a non-jury trial on November 30th and December 1st, 1976. The Court, having carefully considered the facts stipulated by the parties, the evidence and arguments adduced at trial, the briefs of the parties, and the record in the case, is of the opinion that Plaintiff is not entitled to the relief that she seeks.

Plaintiff was originally employed by the Defendant in January of 1972 as an accounting clerk. Subsequently, she was promoted to the position of Administrative Technician IV. After the acting director of the Public Service Careers Division (PSC) of the Texas Department of Community Affairs (TDCA), in which Plaintiff worked, retired, Plaintiff was given additional duties but was not promoted, and she received no increase in salary to compensate her for the additional duties. In early 1973 changes were made in the PSC program that resulted in a reduction in force, and although Plaintiff sought the position of project director, she was terminated on April 1, 1973, receiving two weeks severance pay. Plaintiff was rehired by Defendant for another job on July 9, 1973. Two males

received positions within the PSC division which Plaintiff believes were denied her because of her sex. It is Plaintiff's contention that because of her sex she was denied compensation equivalent to her job prior to her termination, denied promotion to the position of project director, and terminated from employment with Defendant.

The program in which Plaintiff was employed prior to her termination was experiencing difficulties and went through a significant change immediately prior to and at the time of Plaintiff's termination. The events about which Plaintiff complains cannot be understood without some knowledge of the problems that the PSC division faced. The Public Service Careers Division of the Texas Department of Community Affairs was entirely funded by the United States Department of Labor and was a Manpower program designed to assist certain groups in attaining and improving employment with public employers. The Department of Labor (DOL) was not pleased with the way in which this particular program was being run and as a result notified Mr. B. R. Fuller, the Executive Director of TDCA, that the program would be phased out as of March 31, 1973. Mr. Fuller and others in TDCA believed that the program had substantial merit and that the reasons given by DOL for terminating the program were not based entirely upon a correct understanding of the operation of the program. Thus, efforts were made to influence DOL to continue the program, and after considerable communication between TDCA and DOL, the Department of Labor agreed to continue funding the program. In a letter from Charles Johnson, of DOL, to Mr. Fuller, dated March 20, 1973, the Department of Labor Manpower Administration agreed to extend the contract with the Defendant for the PSC program on certain conditions. (Def. Ex. "C") These conditions included requirements that a project director with complete authority to administer the program, including fiscal matters, be

appointed, that a competent and qualified fiscal officer be appointed, that there be a complete reorganization of the staff, that such reorganization meet with the approval of Mr. Johnson, and that other specified problems and deficiencies be corrected. Among these other problems and deficiencies were overstaffing, a lack of fiscal control, a lack of proper documentation of expenditures, payments made on expired contracts, inaccurate record keeping, a lack of communication among the program staff, a lack of training among the staff, and other questionable practices. In response to these requirements, Robert Watts was transferred from another division of TDCA to the PSC division and made project director. Mr. Allen Walz was promoted to the position of administrative procedure technician, and a clerk-typist and a secretary were retained with the program. At the time of the reorganization and reduction in force Plaintiff was terminated, as were Roberto M. Carraveo, a Manpower training coordinator, and Marian Kirkland, an administrtive procedures technician.

Mr. Fuller testified that the employment decision with regard to the reorganization and its related promotion, transfer and terminations were made on the basis of his evaluations and the recommendations of others concerning the relative qualifications of the individuals involved and what would be best for the PSC program. This Court can find no evidence that indicates that the decision not to give the Plaintiff a position in the reorganized PSC division was based on any sexual discrimination. The Court finds that these decisions were based on a good faith, rational evaluation of the relative qualifications of the parties in question and what would be in the best interest of the PSC program. Furthermore, the decision about who should be terminated, as required by the reduction in force mandated by DOL, was made on a non-sexual basis. The three individuals who were terminated, Plaintiff,

Carraveo and Kirkland, did not work well with each other and had some disagreements, and in light of DOL's concern about a lack of communication within the staff and other considerations, it was certainly a rational decision for Defendant to terminate those parties who had had some problems in the PSC program. It should also be noted that DOL required Defendant to submit its proposed personnel changes to DOL for approval and that DOL did approve the changes that were made, including the actions taken with regard to Plaintiff. Thus, this Court finds that the evidence in this case does not support Plaintiff's contention that the refusal to promote her to the positions given to Watts and Walz or the decision to terminate her in the reduction in force in the PSC program were the result of sexual discrimination.

As to Plaintiff's claim that she was discriminated against because of her sex in not being given additional compensation when she was assigned additional duties were the PSC program in November of 1972, the evidence in this case indicates that other individuals within TDCA, both male and female, have on occasions been temporarily given additional duties without any increase in pay or promotion, and the Court can find no basis upon which to conclude that the additional duties given to the Plaintiff in this case, without any increase in salary or promotion, were the result of sexual discrimination. It is the opinion of this Court, after carefully weighing all of the facts, that the actions of Defendant with regard to the employment of Plaintiff were non-discriminatory and did not violate 42 U.S.C. § 2000e-2(a)(1). It should be noted in this regard that Plaintiff was notified on May 11, 1973 of another position open to her within TDCA and that she ultimately took this position and began work on July 9, 1973. In summary, the Court can find no basis upon which to hold that Plaintiff has been discriminated against because of her sex, and on the contrary, the Court finds that the actions of which Plaintiff complains

were not based, in whole or part, on considerations of her sex. Accordingly, it is

ORDERED, ADJUDGED and DECREED that Judgment be, and hereby is, GRANTED for Defendant, and that the relief requested by the Plaintiff be, and hereby is, DENIED. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Entered this *8th* day of December, 1976, at Austin, Texas.

/s/

JACK ROBERTS
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOYCE ANN BURDINE	§	
	§	
V.	§	CIVIL ACTION FILE
	§	NO. A-74-CA-238
	§	
TEXAS DEPARTMENT	§	
OF COMMUNITY	§	
AFFAIRS	§	

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Jack Roberts, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged and Judgment be GRANTED for Defendant, and that the relief requested by the Plaintiff be DENIED.

Dated at Austin, Texas, this 8th day of December 1976.

DAN W. BENEDICT

Clerk of Court

/s/

Wanda V. Peterson
Deputy Clerk

Joyce Ann BURDINE,
Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS
Defendant-Appellee.

No. 77-1101.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1979.

* * *

This employment discrimination case grew out of events occurring within the Texas Department of Community Affairs in late 1972 and in the spring of 1973. As with all employment discrimination cases, the facts are crucial to the outcome.

Appellant Joyce Burdine, a forty-year-old female, was hired in January 1972 by the Texas Department of Community Affairs (TDCA) as an accounting clerk in the Public Service Careers Division (PSC). She had previously acquired several years of experience in the field of manpower training. The PSC's purpose was to provide training and employment opportunities in the public sector for under-skilled persons. Burdine was promoted in July 1972 to Field Services Coordinator. The Project Director of PSC at that time, Mack Nealy, assigned appellant additional duties in early October 1972 and put her in charge of the division when he was out of the office. Nealy resigned from his position in mid-October, and John Malone, Nealy's former supervisor, assigned appellant additional duties in November 1972. However, Burdine was not promoted or given an increase in pay. Burdine made several oral and written applications for the job of Project Director but received

no reply of any kind. She performed the extra duties assigned to her for approximately six months.

The United States Department of Labor (DOL) totally funded PSC; in February 1973 DOS gave written notice to B. R. Fuller, the Executive Director of TDCA, that the PSC project would be terminated as of the end of March 1973 because of alleged inefficiencies in the program.[1] Appellant assisted Fuller in preparing a reply to the DOL charges; negotiations were begun to seek continuation of the project. DOL approved the continuation of PSC on March 20, 1973, but approval was conditioned on the division's meeting certain requirements. These requirements included, among other matters, the appointment of a permanent Project Director and a reorganization of and reduction in the staff. DOL gave no specific orders as to who should be retained, discharged, or appointed but required only that final staff selections meet with DOL's approval.

Fuller consulted with persons whom he considered to be key advisers in the agency and asked for their recommendations for the position of Project Director. Following these consultations, he selected Robert Watts for the post; at that time Watts worked for another division within TDCA. On the advice of subordinates, Fuller decided to terminate Burdine on April 2 and to retain Allen Walz, who had previously been under appellant's supervision, and to promote Walz to Project Coordinator, a position essentially filled by Burdine before her discharge. The decision to terminate Burdine came after her request, based on her assumption that PSC faced extinction, that she be considered for any suitable position within the agency. Her actions made it clear that she wished to remain with TDCA.

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[1]DOL cited, among other problems, lack of fiscal control, failure to properly document expenditures, payments made on expired contracts, overstaffing, lack of a Project Director, insufficient communication and training within PSC staff, and questionable eligibility of some enrollees.

Soon after her termination and after she filed a charge of discrimination with the EEOC, the appellant was rehired by TDCA in July 1973 as a Planning Assistant with a monthly salary of $968, the exact salary given to Walz upon his promotion on April 1, 1973.[2] Since her reinstatement, Burdine's promotions and increased job responsibilities have enabled her to achieve approximately the salary and duties of the male Project Director. Walz resigned in 1974.

Burdine complains that she has been discriminated against on account of sex in three ways: in TDCA's transferring Robert Watts instead of promoting her to Project Director; in TDCA's discharging her while retaining and promoting Allen Walz; and in TDCA's requiring her to perform essentially the same duties as the Project Director without compensating her equally with the male Project Directors who held the post both before her and after her. The trial court found against plaintiff on all three issues. We shall refer to portions of the court's memorandum opinion in the course of our discussion of each issue.

Plaintiff's Burden in Title VII Cases

Appellee contends that plaintiffs in Title VII[3] cases brought against a government agency must prove discriminatory intent and relies on *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). We rejected that blanket contention in *Scott v. City of Anniston*, 597 F.2d 897 (5th Cir. 1979). However, where plaintiff alleges disparate *treatment* under Title VII, as does plaintiff-appellant here, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *International Brotherhood of*

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[2]Walz' salary before his retention and promotion was $590 per month.

[3]42 U.S.C. § 2000e *et seq.*

Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977).[4] Therefore, we accept defendant-appellee's contention, although not for the reasons cited in its brief; proof must have been made at trial that defendant treated Ms. Burdine differently *because* she is female.

Standard of Review

Although discrimination is a question of fact, it is also the ultimate issue for resolution in a Title VII case. Therefore, we as an appellate court must independently determine the merits of plaintiff's allegations, but we are bound by findings of subsidiary facts (evidentiary facts) that are not clearly erroneous. *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975). We must also determine whether the ultimate finding is based on requisite subsidiary facts. *Id.* at 399, *citing Humphrey v. Southwestern Portland Cement Co.*, 488 F.2d 691, 694 (5th Cir. 1974).

Hiring the Project Director

Plaintiff contends that, by transferring Robert Watts, a male, instead of promoting her to Project Director, defendant discriminated against her on account of sex.[5] The elements of such cases are clear. In order to establish a prima facie case, plaintiff must show that (1) she belongs to a group protected by Title VII, (2) she applied for and was qualified for a job for which the

---

[4]The same footnote in *Teamsters*, however, makes clear that proof of motive is not needed when a Title VII plaintiff alleges disparate *impact*.

[5]42 U.S.C. § 2000e—2(a) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

employer was seeking applicants, (3) despite her qualifications she was rejected, and (4) after her rejection the position remained open and the employer continued to seek applicants among persons having plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). These elements may differ, depending on the factual context. *Id.* at 802 n.13, 93 S.Ct. 1817. We believe plaintiff's proof at trial clearly met the *Green* criteria. She is protected under Title VII from sex discrimination. She applied for the Project Director's job several times and was considered for the job, and her proof that she was qualified received implicit support from defendant's evidence.[6] The employer rejected her and, after the position remained unfilled for several months, hired a male for the position.

Defendant may refute plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for the rejection. *Id.* This court requires defendant to prove nondiscriminatory reasons by a preponderance of the evidence. *Turner v. Texas Instruments*, 555 F.2d 1251, 1255 (5th Cir. 1977). This holding is not inconsistent with *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), which merely stated that defendant is not required to prove absence of discriminatory motive. Our holding in *Turner* simply states the obvious: "articulating" a legitimate reason involves more than merely stating fictitious reasons; *legally sufficient* proof is needed before the trier of fact can find plaintiff's proof rebutted. *Turner, supra* at 1255.

In *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), this court added another element to defendant's rebuttal in disparate treatment cases: defendant must prove that those he hired or promoted were somehow *better*

[6]For example, on cross-examination, Fuller refused to state that plaintiff was not qualified to be Project Director; he merely asserted that Watts was better qualified.

qualified than was plaintiff; in other words, comparative evidence is needed. An assertion, for example, that plaintiff had a poor work history will not suffice unless defendant can show by comparative factual data that those hired or promoted had a better work history. *Id.* at 339-40.

TDCA introduced testimony that the male who was hired as Project Director, Robert Watts, was better qualified than Burdine. Fuller testified that Watts had a college degree and had done advanced work; Fuller also cited Watts' experience in administration and his ability to work well with others. Burdine, on the other hand, attended college for only one year and had no degree; Fuller also felt that she had had some difficulty with her co-workers. While Fuller admitted that the Project Director need have no degree, we believe that the trial court's implicit evidentiary finding that Watts was better qualified is not clearly erroneous. Thus, the court's holding[7] that TDCA did not discriminate against Burdine in its failure to promote her to Project Director is affirmed.[8]

---

[7]Specifically, the trial court stated:

> This court can find no evidence that indicates that the decision not to give the plaintiff a position in the reorganized PSC Division was based on any sexual discrimination. The court finds that these decisions were based on a good-faith, rational evaluation of the *relative qualifications* of the parties in question and what would be in the best interest of the PSC program.

(emphasis added). It will be noted that the memorandum opinion of the trial court is silent on whether plaintiff made out a prima facie case. However, since we uphold an implicit finding that defendant successfully rebutted plaintiff's case, this lack is immaterial to the outcome here.

[8]Once plaintiff's prima facie case has been successfully rebutted, plaintiff must be given "a fair opportunity to show that [the employer's] stated reason for . . . rejection was in fact pretext." *McDonnell Douglas v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973). Since plaintiff does not complain about lack of opportunity to prove pretext, we assume that she had that opportunity and failed to carry that burden of proof.

Retention and Promotion of Walz and Discharge of Burdine

Applying *East's* authority to make an independent determination of plaintiff's allegations, we must disagree with the trial court's finding in regard to Burdine's discharge. The trial court, in addition to its holding quoted in note 7, *supra*, held:

> [T]he decision about who should be terminated, as required by the reduction in force mandated by DOL, was made on a non-sexual basis. The three individuals who were terminated, Plaintiff [and two others], did not work well with each other and had some disagreements, and in light of DOL's concern about a lack of communication within the staff and other considerations, it was certainly a rational decision for defendant to terminate those parties who had had some problems in the PSC program.

Here again plaintiff met *Green's* first three elements. She proved that she sought continuing employment with TDCA and was qualified to do the job that Allen Walz was retained and promoted to do. In fact, she had been doing that job, and more, for six months when terminated. In discharge cases involving disparate treatment incident to a reduction in force, we can articulate *Green's* fourth element thus: after her discharge, the employer hired nonminority personnel having qualifications no better than plaintiff's, or retained those having lesser ones, for positions comparable to hers. *Cf. Marks v. Prattco, Inc.*, No. 79-1394, Slip op. at 1554, — F.2d — (5th Cir., Dec. 7, 1979)(discharge case not involving reduction in force). She meets that element as well. Plaintiff's evidence was uncontroverted by any of defendant's evidence; moreover, much of defendant's evidence substantiated

plaintiff's prima facie case.[9]

In rebuttal, defendant's evidence falls short of the standard required by *Turner* and *East*. Defendant failed to introduce comparative factual data concerning Burdine and Walz. Fuller merely testified that he discharged and retained personnel in the spring shakeup at TDCA primarily on the recommendations of subordinates and that he considered Walz qualified for the position he was retained to do. Fuller failed to specify any objective criteria on which he based the decision to discharge Burdine and retain Walz. He stated only that the action was in the best interest of the program and that there had been some friction within the department that might be alleviated by Burdine's discharge. Nothing in the record indicates whether he examined Walz' ability to work well with others. This court in *East* found such unsubstantiated assertions of "qualification" and "prior work record" insufficient absent data that will allow a true *comparison* of the individuals hired and rejected. Plaintiff's evidence showed that she supervised Walz before her discharge; defendant admitted that she had more seniority and knowledge of the PSC program than Walz. After her employer placed her in a position of great responsibility without the necessary authority to deal with recalcitrant staff personnel, the employer seems to have discharged her for not being able to do the job smoothly and hired a less experienced male for the job.

Defendant's bald assertion that Walz was "qualified" will not support the district court's holding if we employ *East's* rebuttal standard. Neither will defendant's reliance on subjective evaluations and recommendations by subordinates, *see, e.g., Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976),

[9]Fuller admitted that Burdine had more experience in manpower programs than Walz and had trained Walz for the job he held before her discharge.

particularly where the employer must take some responsibiity for the "friction" between plaintiff and staff personnel and where no comparative data were introduced to evaluate either Walz' behavior in the same situation or his relationship with the two employees who were discharged along with the plaintiff.[10]

Defendant relies heavily on the fact that DOL mandated the reduction in staff and also required TDCA to submit the name of the Project Director and the other proposed personnel changes to DOL for approval. The trial court likewise seems to have relied on this intervention by DOL and DOL's eventual approval of the actions taken with regard to plaintiff. However, defendant's evidence failed to show that DOL would not have approved plaintiff as Project Director or that DOL required or even suggested to TDCA that it terminate plaintiff and retain Walz.

To say that defendant's decision was rational begs the issue; an employer may be rational and still intend to discriminate on account of race or sex. Plaintiff successfully proved intent by making out a prima facie case against TDCA on this issue, and defendant's evidence is insufficient to rebut the proof of intent here. Thus, since TDCA failed to rebut plaintiff's prima facie case as regards her discharge and Walz' retention, we must reverse the trial court on this issue.[11] We remand

[10]The problems within the PSC staff predated Burdine's assumption of the Project Director's duties. At least one of the two persons terminated along with Burdine had caused Nealy, before he resigned, considerable difficulty, and Nealy expressed, in a letter to Fuller, grave concern about the employee's behavior. Burdine later encountered problems in dealing with the same employee and detailed them in a memo to Malone.

[11]While the trial court failed to make specific findings either that plaintiff established a prima facie case or that defendant was successful in rebuttal, we need not remand for further fact findings on liability, since we find that a prima facie case was made out as a matter of law and that defendant's proof falls far short of rebuttal standards set by our case law.

this issue to the trial court for determination of damages and attorney's fees.

The Equal Pay Claim

Plaintiff contends that TDCA violated her rights under the equal pay provision of Title VII.[12] The last sentence of that provision incorporates the defenses found in the Equal Pay Act.[13] That Act allows pay differentials if based on unequal skill, effort, or responsibility[14] and articulates four defenses. The only

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[12]42 U.S.C. § 2000e—2(h) states:

Notwithstanding any other provision in this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. *It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards act of 1938, as amended.*
(emphasis added).

[13]29 U.S.C. § 206(d).

[14]The Ninth Circuit recently held that Title VII is broader in scope than the Equal Pay Act and that the latter applies only where plaintiff contends there has been a denial of equal pay for equal work. *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979). In a case involving comparable but not substantially equal work, only the Equal Pay Act's four affirmative defenses, but not its equal work requirement, are incorporated into Title VII. *Id.* Since plaintiff here claims to have done substantially equal work, we need not decide now whether we would follow the lead of that circuit.

defense arguably applicable here is that the unequal pay was not based on sex.

Plaintiff's burden in this pay case is to prove that a wage differential is based on sex and that there was performance of equal work for unequal compensation. *Orr v. Frank R. MacNeill & Son*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975). The job need not be identical, only substantially equal. *Id.*

The plaintiff's evidence showed that she was given additional duties and responsibilities after Nealy resigned and that she fulfilled substantially all of the functions of Project Director. Testimony and other evidence showed that Nealy, before he resigned, made $1,179 per month as Project Director; Burdine received no raise and continued making approximately $900 per month after she assumed most of his duties. Malone, Nealy's supervisor, was given a raise during this time period, ostensibly to compensate him for his added duties as "acting director," most, if not all, of which duties he had delegated to Burdine. Watts' salary on assuming the Project Director's post was $1,259 per month.

We think this evidence, if credible, establishes a prima facie case of discriminatory pay differential. Her factual proof tends to establish that her employer paid her "at a rate less than the rate at which he pays wages to [male] employees . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility . . . ." 29 U.S.C. §206(d); *see Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971). However, some of defendant's evidence, if credible, tended to show that the work was not equal.[15]

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[15]Fuller testified that he did not regard Burdine as acting Project Director and that other people had some responsibility for PSC's administration.

The trial court made no finding that plaintiff had (or had not) been doing work substantially equal to that of the Project Director. It recognized that she had been assigned extra duties but stated that "the evidence . . . indicates that other individuals within TDCA, both male and female, have on occasions been temporarily given additional duties without any increase in pay or promotion." The court thus found that plaintiff had failed to prove the pay differential was caused by sex discrimination.

We must remand this issue to the district court. On remand the court should make specific findings on whether plaintiff established a prima facie case and, if so, whether defendant successfully rebutted that case with evidence showing either that the work has not substantially equal or that the pay differential was based on a factor other than sex. We would observe here, however, that if the work is substantially equal, a bare, self-serving, general assertion that employees are frequently assigned extra duties at no increase in pay will not serve to rebut a prima facie case. This is true especially in light of plaintiff's documentary proof that she assumed extra duties for about six months; that her pay was substantially lower than the two male employees who did that work before and after her; and that her male supervisor received additional compensation for "increased responsibilities and work load," yet she, not he, assumed some of those burdens. More specific facts are needed to rebut this evidence: How long were other employees required to perform extra work? What were the pay differentials involved on the other occasions? What was the sex of the employees in the other instances?

In conclusion, we summarize our holding. The trial court's finding that there was no sex discrimination in defendant's appointment of Robert Watts as Project Director is affirmed. We do find that defendant discriminated againt plaintiff on account of her sex

when it terminated her and retained and promoted Allen Walz. On remand the trial court should award plaintiff back pay based on Walz' salary for the months during which plaintiff was not employed by defendant, mitigated by any other earnings or unemployment compensation plaintiff may have received or that it concludes she should by reasonable efforts have obtained. *See Guerra v. Roma Independent School District*, 444 F.Supp. 812, 822 n.9 (S.D.Tex. 1977). We also remand for the trial court to enter findings on whether plaintiff established a prima facie case under the equal pay provision of Title VII and, if so, whether defendant's evidence rebuts that case.

Since plaintiff has prevailed on one issue, the trial court should also consider the matter of awarding attorney's fees; such fees should ordinarily be recovered by prevailing Title VII plaintiffs in all but special circumstances. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 698, 54 L.Ed.2d 648 (1978); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 716 (5th Cir. 1974).

AFFIRMED in part, REVERSED in part, and REMANDED.